U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0118 BLA

FRED M. CHILDERS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH FORK COAL CORPORATION	)	DATE ISSUED: 11/29/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06070) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed on November 25, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with twenty-eight years of underground coal mine employment and found that he suffers from a totally disabling respiratory or pulmonary impairment. Based on these findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further determined that employer failed to rebut the presumption and she awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in determining the length of claimant's smoking history and in finding that he is totally disabled. Employer also asserts that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. SMOKING HISTORY

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] The administrative law judge accepted the parties' stipulation that claimant had twenty-eight years of underground coal mine employment, and we affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6; Hearing Transcript at 5-6.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

Initially, we address employer's contention that the administrative law judge erred in determining the length of claimant's smoking history. The administrative law judge indicated that claimant testified at the hearing that he "began smoking as an adult and smoked for ten years, but he has not smoked in the past [fifteen] years or since 2000." Decision and Order at 5; *see* Hearing Transcript at 11-12. She further noted that claimant testified that he "smoked one pack a day, but he would not finish each cigarette." *Id*.

Based on her consideration of evidence, the administrative law judge concluded that claimant had a ten pack year smoking history and explained:

> I give credit to [c]laimant's testimony at the hearing and Dr. Klayton's testimony, as the only two smoking histories taken under oath, that [c]laimant smoked about a pack a day for ten years. This is generally supported by the smoking histories reported to the physicians of record. Additionally, as [c]laimant testified to smoking approximately a pack a day and told Drs. Splan, Van Breeding, Jaroushi, and Klayton he smoked a pack per day, I find [c]laimant to have a smoking history of [one] pack per day. In sum, I find that [c]laimant smoked cigarettes for [ten] years at a rate of [one] pack per day totaling [ten] pack years.

Decision and Order at 5.

Employer argues that the administrative law judge erred in relying on Dr. Klayton's testimony to find that claimant smoked ten pack years. Employer contends that Dr. Klayton's testimony may be "probative to establish what [claimant] told him, but not whether the statement was true." Employer's Brief at 3. Employer also asserts that claimant's testimony is not reliable, because "a smoking history reported to a treating physician for purposes of medical diagnosis and treatment is more reliable than self-serving statements made for purposes of litigation." *Id*. Employer contends that the administrative law judge should have determined that claimant smoked one and one-half packs of cigarettes per day for at least twenty-five years, based on treatment records from Dr. Alam.[4] Employer's arguments are without merit.

While it is true that Dr. Klayton's testimony does not establish the veracity of claimant's assertion that he smoked for ten years, it is relevant to determining whether claimant gave the same or similar histories to other physicians. The administrative law

[4] Claimant testified at the hearing that he did not remember telling Dr. Alam that he smoked for twenty-five years at the rate of one and one-half packs of cigarettes a day. Hearing Transcript at 14.

judge's finding that claimant smoked for ten years is supported by claimant's testimony and the following histories: Dr. Splan noted a smoking history of one pack a day for ten years, with claimant quitting in 2000; Dr. Jaroushi noted a smoking history of one pack a day for ten years; and Dr. Klayton testified during his deposition that claimant told him he smoked a pack a day for ten years. Decision and Order at 5, Director's Exhibits 17, 15; Claimant's Exhibit 4.

The credibility of the witnesses and the weight to be accorded the evidence are matters within the sound discretion of the administrative law judge. S*ee Mabe v. Bishop Coal Co.*, 9 BLR 1-167 (1986). We see no error in the administrative law judge's decision to rely on claimant's hearing testimony and give it controlling weight regarding the length and duration of claimant's smoking history. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc). We also see no error in the administrative law judge's finding that claimant's testimony regarding his smoking history was "generally supported" by the smoking histories claimant reported to Drs. Splan, Van Breeding, Jaroushi and Klayton. Decision and Order at 5; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, we affirm the administrative law judge's determination that "[c]laimant smoked cigarettes for [ten] years at a rate of [one] pack per day, totaling ten pack years," as supported by substantial evidence. Decision and Order at 5; see *Clark*, 12 BLR at 151.

II. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) the presence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986).

In this case, the administrative law judge weighed the results of five pulmonary function studies, dated January 2, 2012, August 8, 2012, October 16, 2012, November 19, 2012, and September 27, 2013. Decision and Order at 8-9; Director's Exhibit 17; Claimant's Exhibits 3, 4; Employer's Exhibits 2, 4. Each of the five studies was performed before and after the use of a bronchodilator. The administrative law judge determined that: the November 19, 2012 and September 27, 2013 pre-bronchodilator tests had qualifying values for total disability;[5] the January 2, 2012 and October 16, 2012 pre-bronchodilator tests were "borderline;" the August 8, 2012 pre-bronchodilator test was non-qualifying; and all five of the post-bronchodilator tests were non-qualifying. Decision and Order at 8-9. The administrative law judge concluded that claimant is unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as "the majority of the pulmonary function tests are non-qualifying." *Id*. at 9.

Because there were no qualifying arterial blood gas studies, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 10; Director's Exhibit 17; Employer's Exhibits 2, 4; Claimant's Exhibits 3, 4. Furthermore, as there is no evidence in the record indicating that claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11.

Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered five medical opinions from Drs. Splan, Habre, Rosenberg, Klayton and Jaroushi. Director's Exhibit 17, Claimant's Exhibits 3, 4, Employer's Exhibits 2, 4, 5, 8. She gave little weight to the opinions of Drs. Splan and Habre because they "did not document the exertional requirements of [c]laimant's last coal mine employment." Decision and Order at 18. The administrative law judge determined that Drs. Rosenberg, Klayton, and Jaroushi "each demonstrate an understanding of the exertional requirements of [c]laimant's last coal mine job." *Id*. She credited the opinions of Drs. Klayton and Jaroushi that claimant is totally disabled, over Dr. Rosenberg's contrary opinion. *Id*.

Employer argues that the administrative law judge erred in relying on the opinions of Drs. Klayton and Jaroushi to find that claimant is totally disabled because they "fail to

[5] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(i), (ii).

explain how the non-qualifying pulmonary function studies would render [c]laimant unable to perform his usual coal mine work." Employer's Brief at 3. Employer's argument is rejected as without merit.

The administrative law judge observed that claimant's usual coal mine employment was as a belt examiner, which required him to perform "moderate to heavy manual labor." Decision and Order at 12. Dr. Klayton noted that claimant had to lift up to eighty pounds in his job, and specifically opined that claimant would not have been able to do this job, "based on [claimant's] dyspnea with minimal exertion, poor exercise tolerance on bicycle ergometry" and the pulmonary function tests showing "moderate obstructive lung disease with air trapping and decreased diffusion capacity." Claimant's Exhibit 3. Similarly, Dr. Jaroushi noted that claimant had to lift between fifty and seventy pounds "at any given time on any given day." Claimant's Exhibit 4. Dr. Jaroushi diagnosed "moderate hypoxemia on resting arterial blood gases," and explained that claimant is totally disabled "based on his dyspnea with minimal exertion, poor exercise tolerance on bicycle ergometry, and pulmonary function tests." *Id*. Dr. Jaroushi also opined that claimant's pulmonary function tests showed moderately severe obstructive defect with an FEV1 of 57% of predicted, an FEV1/FVC ratio which was 60% of predicted, and an MVV that was 29% of predicted. *Id*.

Because Drs. Klayton and Jaroushi discussed the objective evidence in conjunction with the exertional requirements of claimant's usual coal mine work, we affirm the administrative law judge's reliance on their opinions to find that claimant is totally disabled. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We affirm, therefore, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment, based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[6] *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). As employer does not raise any further allegations of error with respect to the administrative law judge's determination that claimant has a totally disabling respiratory

[6] Employer asserts that the opinions of Drs. Klayton and Jaroushi are not credible because they "are based on erroneous smoking histories." Employer's Brief at 4. However, we have affirmed the administrative law judge's finding of a ten pack-year smoking history, which is consistent with the histories relied upon by Drs. Klayton and Jaroushi. Claimant's Exhibits 3 at 2, 4 at 2. Moreover, the length of claimant's smoking history, while relevant to the issue of disability causation, is not relevant to the issue of whether claimant has a respiratory or pulmonary impairment that is totally disabling. *See* 20 C.F.R. §718.204(a), (b); 20 C.F.R. §718.204(c); 20 C.F.R. §718.305.

or pulmonary impairment, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption.

III. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

The administrative law judge first determined that employer failed to rebut the presumed fact of clinical pneumoconiosis by a preponderance of the x-ray evidence and medical opinions. Decision and Order at 24-25. Next, the administrative law judge found that "the physicians largely combine their discussion of legal pneumoconiosis and whether claimant's disease is related to coal dust exposure." *Id.* at 25. Thus, the administrative law judge stated that she would address the issues of whether employer rebutted the presumed existence of legal pneumoconiosis and disability causation "simultaneously." *Id.* The administrative law judge specifically determined that "[a]ll of the physicians agree that [c]laimant suffers from legal pneumoconiosis." *Id.* at 26. Thus, the administrative law judge found that employer "did not rule out that claimant's disabling respiratory impairment was significantly related to, or aggravated by, occupational coal dust exposure; or that [claimant] suffers from legal pneumoconiosis." *Id.*

Employer asserts that the administrative law judge erred in failing to properly consider whether that the opinions of Drs. Splan, Klayton and Jaroushi, diagnosing legal pneumoconiosis, are consistent with the preamble. Employer further asserts that the administrative law judge improperly rejected Dr. Rosenberg's opinion in favor of "broad generalizations based on assertions made in the preamble" that the effects of smoking and coal dust exposure are additive. Employer's Brief at 5-6. Employer's arguments are without merit.

The administrative law judge did not reject Dr. Rosenberg's opinion as contrary to the preamble. Rather, the administrative law judge found that Dr. Rosenberg diagnosed legal pneumoconiosis to the extent that he opined that claimant's "respiratory condition was aggravated by past coal mine dust exposure" and specifically stated that "[claimant] cannot return to such an environment because of this legal [coal workers'

pneumoconiosis.]" Employer's Exhibit 2 at 5; *see* Decision and Order at 26. Thus, because it is supported by substantial evidence,[7] we affirm the administrative law judge's determination that employer failed to disprove the presumed facts of legal pneumoconiosis and disability causation. 20 C.F.R. §718.305(d)(1)(i)(A), (ii); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Bender*, 782 F.3d at 137. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption at

[7] Because employer bears the burden of proof on rebuttal, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Section 411(c)(4). *See* 30 U.S.C. §921(c)(4); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge